

1 PAGES 1 - 22

2 UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF CALIFORNIA

4 BEFORE THE HONORABLE JAMES DONATO

5 IN RE: FACEBOOK BIOMETRIC)
6 INFORMATION PRIVACY LITIGATION) NO. 15-CV-3747 JD
7)
8) SAN FRANCISCO, CALIFORNIA
9) WEDNESDAY, JUNE 29, 2016

10 FREDERICK WILLIAM GULLEN, ON)
11 BEHALF OF HIMSELF AND ALL OTHERS)
12 SIMILARLY SITUATED,)
13)
14 PLAINTIFF,)
15)
16 V.)
17 FACEBOOK, INC.,)
18)
19 DEFENDANT.)
20

21 **TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**

22 **RECORDING 1:34 P.M. - 1:56 P.M.**

23 **APPEARANCES:**

24 FOR PLAINTIFFS ROBBINS, GELLER, RUDMAN & DOWD, LLP
25 ONE MONTGOMERY STREET, SUITE 1800
26 SAN FRANCISCO, CALIFORNIA 94104
27 BY: **SHAWN A. WILLIAMS, ESQUIRE**

28 (FURTHER APPEARANCES ON FOLLOWING PAGE)

29 **REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR**
30 **RETIRED OFFICIAL COURT REPORTER, USDC**

1 **APPEARANCES (CONTINUED) :**2 **FOR PLAINTIFFS** LABATON SUCHAROW, LLP
3 140 BROADWAY
4 NEW YORK, NEW YORK 10005
5 **BY: CORBAN S. RHODES, ESQUIRE**6 EDELSON PC
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9 **BY: RAFEY S. BALABANIAN, ESQUIRE**10 CAREY RODRIGUEZ, LLP
11 1395 BRICKELL AVENUE, SUITE 700
12 MIAMI, FLORIDA 33130
13 **BY: FRANK S. HEDIN, ESQUIRE**
14 **DAVID MILLIAN, ESQUIRE**15 **FOR DEFENDANT** MAYER BROWN, LLP
16 350 SOUTH GRAND AVENUE, 25TH FLOOR
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18 **BY: JOHN NADOLENCO, ESQUIRE**19 MAYER BROWN, LLP
20 1221 AVENUE OF THE AMERICAS
21 NEW YORK, NEW YORK 10020
22 **BY: LAUREN R. GOLDMAN, ESQUIRE**

1 WEDNESDAY, JUNE 29, 2016

1:34 P.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSEL'S FAILURE TO
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

5 PROCEEDINGS

6 ---000---

7
8 **THE CLERK:** CALLING CIVIL 15-3747, IN RE: FACEBOOK
9 BIOMETRIC INFORMATION PRIVACY LITIGATION AND CIVIL 16-937
10 GULLEN VERSUS FACEBOOK.

11 COUNSEL, PLEASE COME FORWARD AND STATE YOUR
12 APPEARANCES FOR THE RECORD.

13 **MR. WILLIAMS:** GOOD AFTERNOON, YOUR HONOR. SHAWN
14 WILLIAMS, ROBINS, GELLER, RUDMAN & DOWD ON BEHALF OF
15 PLAINTIFFS.

16 **MR. BALABANIAN:** GOOD AFTERNOON, YOUR HONOR. RAFAY
17 BALABANIAN OF EDELSON ON BEHALF OF PLAINTIFFS.

18 **MR. RHODES:** GOOD AFTERNOON, YOUR HONOR. CORBAN
19 RHODES FROM LABATON SUCHAROW ALSO ON BEHALF OF PLAINTIFFS.

20 **MR. HEDIN:** GOOD AFTERNOON, YOUR HONOR. FRANK HEDIN
21 ON BEHALF OF PLAINTIFF GULLEN.

22 **MR. MILLIAN:** GOOD AFTERNOON, YOUR HONOR. DAVID
23 MILLIAN ON BEHALF OF PLAINTIFF GULLEN.

24 **MR. NADOLENCO:** GOOD AFTERNOON, YOUR HONOR. JOHN
25 NADOLENCO OF MAYER BROWN ON BEHALF OF DEFENDANT FACEBOOK.

1 **MS. GOLDMAN:** GOOD AFTERNOON, YOUR HONOR. LAUREN
2 GOLDMAN OF MAYER BROWN ON BEHALF OF FACEBOOK.

3 **THE COURT:** OKAY. ALL RIGHT. SO YOU ALL CAN JUST
4 STAY UP HERE. I WILL -- HERE ARE MY MAIN CONCERNS: I WANT TO
5 MAKE SURE WE DON'T DO EVERYTHING TWICE FOR DISCOVERY. OKAY?

6 SO I'M GOING TO LET YOU ALL HAVE A JOINT CONFERENCE.
7 YOU ALL SIT DOWN AND JUST WORK SOMETHING OUT.

8 YOU MAY HAVE TO TAKE A LITTLE BIT LONGER FOR A DEPO,
9 FOR EXAMPLE, MAYBE AN EXTRA HOUR, YOU ALL DECIDE. LET'S JUST
10 DO IT ONCE. I DON'T WANT TO HAVE WITNESSES COMING BACK TWICE.
11 WE DON'T NEED TWO SETS OF PRODUCTION.

12 I MEAN, IT LOOKS TO ME THAT ABOUT 90 PERCENT-PLUS OF
13 THIS IS GOING TO OVERLAP BETWEEN THE TWO CASES. CAN YOU ALL
14 WORK THAT OUT? OKAY.

15 **UNIDENTIFIED SPEAKER:** YES, YOUR HONOR.

16 **THE COURT:** ALL RIGHT. NOW, IF YOU CAN'T HAVE
17 AGREEMENTS ON YOUR DISCOVERY ISSUES, SEND ME THE LETTERS. YOU
18 KNOW MY STANDING ORDER, SO JUST DO IT THAT WAY. SPOKEO, I
19 GUESS, IS COMING DOWN THE PIKE. IS THAT RIGHT?

20 **MR. RHODES:** THAT'S RIGHT. WE FILED IT THIS MORNING
21 IN THE LICATA CASE.

22 **THE COURT:** IN WHICH CASE?

23 **MR. RHODES:** THE LICATA CASE. WE'LL BE FILING GULLEN
24 EITHER LATER THIS AFTERNOON OR IN THE MORNING.

25 **THE COURT:** SO YOU FILED IT IN RE: FACEBOOK

1 BIOMETRIC?

2 **MR. RHODES:** YES.

3 **THE COURT:** WHAT DID YOU CALL IT?

4 **MR. RHODES:** THE LICATA, THE ORIGINAL NAMED
5 PLAINTIFF.

6 **THE COURT:** I THOUGHT IT WAS PEZEN?

7 **MR. WILLIAMS:** THERE WERE THREE INITIAL CASES, AND
8 THE CASES WERE CONSOLIDATED.

9 **THE COURT:** ALL RIGHT. THAT'S WHY WE ARE DOING "IN
10 RE."

11 CAN WE JUST DO ONE BRIEF FOR EVERYBODY? ALL RIGHT?
12 WE DON'T NEED TO HAVE DUPLICATIVE BRIEFS.

13 **MR. RHODES:** THAT CAN BE (UNDISCERNIBLE).

14 **THE COURT:** SO YOU ARE GOING TO WORK THAT OUT.

15 LET ME ASK YOU A QUESTION. WHO ARE THE GULLEN
16 PEOPLE? ALL RIGHT. WE'RE JUST GOING TO CHAT HERE AMONG
17 FRIENDS. ALL RIGHT?

18 NOW, YOU'RE BEING RECORDED, SO YOU HAVE TO -- THERE'S
19 NO COURT REPORTER, SO YOU HAVE TO SAY WHO YOU ARE BEFORE YOU
20 START SPEAKING.

21 BUT I JUST -- HELP ME UNDERSTAND HOW TAGGING WORKS IF
22 YOU DON'T HAVE A FACEBOOK ACCOUNT.

23 **MR. HEDIN:** YOUR HONOR, THIS IS FRANK HEDIN FROM
24 CAREY RODRIGUEZ. THERE'S NO TAGGING NECESSARILY INVOLVED IN
25 ALL OF THE NON-USERS' CLAIMS, BUT IN ORDER TO DETERMINE WHETHER

1 OR NOT A PARTICULAR PHOTO CONTAINS A USER OR A NON-USER THAT
2 MATCHES A FACE IN FACEBOOK'S DATABASE, FACEBOOK HAS TO COLLECT
3 A FACE SCAN OF ALL OF THE INDIVIDUALS APPEARING IN THE
4 PHOTOGRAPH, USERS AND NON-USERS ALIKE.

5 **THE COURT:** WHAT DOES THAT MEAN, THOUGH? YOU
6 THINK -- ARE YOU ALLEGING THAT FACEBOOK COLLECTS AND STORES THE
7 FACE GEOMETRY OF NON-USERS?

8 **MR. HEDIN:** YES. WE ALLEGE THAT THEY COLLECT AND
9 STORE BOTH, BUT DISCOVERY IS GOING TO REVEAL THE EXTENT OF
10 THEIR STORAGE, BUT AT THE VERY LEAST WE'RE CONFIDENT THAT
11 THEY'RE COLLECTING THE FACE SCANS OF NON-USERS IN ORDER TO
12 DETERMINE WHETHER OR NOT IT MATCHES THE FACE SCAN OF SOMEBODY
13 SAVED IN THEIR DATABASE.

14 **THE COURT:** HOW ARE THEY GOING TO IDENTIFY -- I MEAN,
15 HOW -- IF YOU'RE A NON-USER, HOW ARE YOU GOING TO BE
16 IDENTIFIED? ASSUMING THIS DATABASE EXISTS, HOW WOULD THAT FACE
17 BE IDENTIFIED?

18 **MR. HEDIN:** HOW WOULD IT BE MATCHED AGAINST A FACE IN
19 THE DATABASE OR HOW WOULD IT BE IDENTIFIED?

20 **THE COURT:** YOU'RE SAYING THEY'RE STORING IT. HOW
21 ARE THEY GOING TO IDENTIFY THAT FACE GEOMETRY? IF YOU ARE NOT
22 A USER, THERE'S NOTHING TO ASSOCIATE THAT FACE WITH AN ACCOUNT.
23 SO IF THERE'S NO ACCOUNT TO ASSOCIATE IT WITH, HOW ARE THEY
24 STORING IT? ARE THEY JUST GIVING IT RANDOM IDENTIFICATION
25 NUMBERS?

1 **MR. HEDIN:** WELL, FACEBOOK DOES ALLOW USERS TO TAG
2 NON-USERS' NAMES TO FACES. THE EXTENT OF THE STORAGE OF THOSE
3 FACE TEMPLATES AFTER A NAME IS TAGGED TO A NON-USER, YOU KNOW,
4 WE'RE UNSURE OF. BUT IN ORDER TO DETERMINE WHETHER OR NOT IT
5 MATCHES A USER, SOMEBODY THAT THEY CAN IDENTIFY AS DEFINITELY
6 BEING A USER OF FACEBOOK, THEY NEED TO COLLECT THE STANDARD
7 FACE GEOMETRY FROM EVERY FACE APPEARING IN EVERY PHOTO.

8 **THE COURT:** SO WHEN YOU SAY "COLLECT," WHAT DO YOU
9 MEAN? ARE THEY STORING IT?

10 **MR. HEDIN:** I DON'T NECESSARILY KNOW IF THEY'RE
11 STORING IT, BUT THEY'RE DEFINITELY COLLECTING IT. BECAUSE IN
12 ORDER TO DETERMINE WHETHER THE FACE IS THE FACE OF A USER OR A
13 NON-USER, THEY HAVE TO COLLECT FACE GEOMETRY TO COMPARE IT
14 AGAINST THE FACE GEOMETRY IN THE DATABASE. AND THAT ALLEGATION
15 ALONE IS SUFFICIENT UNDER THE STATUTE.

16 **THE COURT:** ALL RIGHT. FACEBOOK?

17 **MS. GOLDMAN:** NO, YOUR HONOR. FACEBOOK DOES NOT
18 COLLECT, CREATE, STORE TEMPLATES OF NON-USERS' FACES.

19 **THE COURT:** CAN YOU TAG A NON-USER?

20 **MS. GOLDMAN:** YOU CAN PUT IN SOMETHING THAT IS CALLED
21 A FREEFORM TAG. SO YOU COULD TAG SOMEBODY -- PLAINTIFF ALLEGES
22 THAT THE PLAINTIFF PERSON WAS TAGGED, FREDERICK W. GULLEN. BUT
23 PEOPLE ALSO TAGGED MICKEY MOUSE OR AUNT SALLY. BUT THAT
24 FREEFORM TAG DOES NOT -- IS NOT LINKED TO ANYTHING THAT WOULD
25 ALLOW FACEBOOK OR ANYBODY ELSE TO IDENTIFY --

1 **THE COURT:** SO WHAT -- IS IT A ONE-TIME-ONLY
2 TRANSIENT -- WHAT DOES FREEFORM TAG MEAN?

3 **MS. GOLDMAN:** IT MEANS THAT THERE IS A TAG THAT IS
4 ASSOCIATED WITH THAT PHOTOGRAPH, BUT NOT WITH ANY SCAN OF FACE
5 GEOMETRY IN THAT PHOTOGRAPH, JUST LITERALLY ASSOCIATED WITH THE
6 PHOTOGRAPH.

7 **THE COURT:** THE PICTURE ITSELF?

8 **MS. GOLDMAN:** CORRECT.

9 **THE COURT:** DID YOU SHARE THIS WITH THE GULLEN
10 PLAINTIFF?

11 **MS. GOLDMAN:** WE HAVEN'T UNDERGONE DISCOVERY. THAT'S
12 JUST MY PERSONAL UNDERSTANDING OF HOW IT WORKS. I AM NOT
13 MAKING REPRESENTATIONS, BUT I BELIEVE THAT IS WHAT DISCOVERY
14 WILL SHOW.

15 **THE COURT:** IT DOES SEEM A LITTLE BIT MYSTERIOUS TO
16 ME. IS IT "HEDIN" OR "HEDEN"?

17 **MR. HEDIN:** HEDIN.

18 **THE COURT:** HEDIN. OPTION THREE. ALL RIGHT.

19 LOOK, I MEAN, YOU ARE GOING TO DO WHAT YOU'RE GOING
20 TO DO, BUT I JUST HAVE TO SAY I'M A LITTLE AT SEA ON HOW
21 NON-ACCOUNT HOLDERS, WHICH IS ONE HUNDRED PERCENT OF YOUR
22 CLASS, ARE BEING COLLECTED AND STORED BY FACEBOOK.

23 **MR. HEDIN:** EVEN ASSUMING THE FACE SCANS OF NON-USERS
24 ARE NOT BEING STORED, THEY'RE DEFINITELY BEING COLLECTED,
25 BECAUSE IN ORDER TO DETERMINE WHETHER A NON-USER -- IN THE

1 FIRST INSTANCE, IN ORDER TO DETERMINE WHETHER THAT FACE SCAN OF
2 A NON-USER MATCHES A FACE SCAN OF THE STORED USERS IN THE
3 DATABASE, THE FACE SCAN HAS TO BE COLLECTED. YOU CAN'T
4 COMPARE -- YOU HAVE TO COMPARE APPLES TO APPLES. YOU CAN'T
5 COMPARE APPLES WITH ORANGES. YOU HAVE TO COLLECT A FACE SCAN
6 OF EVERYBODY APPEARING IN A PHOTOGRAPH IN ORDER TO DETERMINE
7 WHETHER OR NOT THOSE PEOPLE ARE, IN FACT, USERS OR NON-USERS.

8 **THE COURT:** HOW WOULD THE BIPA WORK? I MEAN, BIPA IS
9 A WRITTEN CONSENT STATUTE. WHAT IS -- I MEAN, FACEBOOK, SURELY
10 YOU'RE NOT -- THIS IS RHETORICAL. YOU DON'T HAVE TO ANSWER
11 THIS NOW.

12 SURELY, YOU'RE NOT CONTENDING THAT UNDER THE BIPA,
13 FACEBOOK HAS TO GET -- PROACTIVELY GET THE WRITTEN CONSENT OF
14 ANYBODY WHO MIGHT SHOW UP IN A FACEBOOK PHOTOGRAPH? I MEAN,
15 THAT WOULD BE PATENTLY UNREASONABLE.

16 SO I JUST -- I MEAN, I DON'T UNDERSTAND HOW A
17 WRITTEN -- A PRIVACY WRITTEN NOTIFICATION AND CONSENT STATUTE
18 CAN APPLY TO PEOPLE WHO ARE NON-USERS.

19 **MR. HEDIN:** WELL, FOR EXAMPLE, IN THE EUROPEAN UNION,
20 FACEBOOK HAS HAD TO DEACTIVATE THEIR ENTIRE FACE SCANNING
21 FEATURE FOR JUST THAT REASON.

22 **THE COURT:** YES, BUT, COUNSEL, WE ARE IN THE UNITED
23 STATES.

24 **MR. HEDIN:** RIGHT.

25 **THE COURT:** WE'RE NOT IN THE EU.

1 **MR. HEDIN:** I UNDERSTAND.

2 **THE COURT:** AND THE EU HAS DIFFERENT DATA PROTECTION
3 POLICIES THAT WE DO NOT SHARE OR FOLLOW.

4 **MR. HEDIN:** SO IF FACEBOOK CAN'T COMPLY WITH BIPA,
5 UNDER THE CIRCUMSTANCES --

6 **THE COURT:** HOW COULD IT COMPLY WITH BIPA SHORT OF
7 REQUIRING EVERYBODY IN -- EVERY LIVING HUMAN IN THE STATE OF
8 ILLINOIS TO GIVE PROACTIVE WRITTEN CONSENT? I MEAN, COULD IT
9 OTHERWISE COMPLY WITH BIPA?

10 **MR. HEDIN:** IT COULD DISABLE THE FACE SCANNING
11 FEATURE FROM ALL PHOTOGRAPHS uploaded FROM IP ADDRESSES THAT
12 ARE -- THAT CORRESPOND TO THE STATE OF ILLINOIS.

13 **THE COURT:** IN OTHER WORDS, JUST A BAN IN THE
14 PROGRAM?

15 **MR. HEDIN:** POSSIBLY.

16 **THE COURT:** SO, BASICALLY, IN YOUR VIEW, BIPA WOULD
17 MAKE IT ENTIRELY ILLEGAL TO DO TAGGING?

18 **MR. HEDIN:** I'M NOT GOING TO -- I'M NOT SAYING THAT
19 AT THIS POINT. DISCOVERY IS GOING TO REVEAL THE EXTENT OF
20 FACEBOOK'S --

21 **THE COURT:** WE'RE TALKING ABOUT THE STATUTE. WE'RE
22 NOT TALKING ABOUT THE FACTS. YOU'RE SAYING THAT BIPA WOULD
23 MAKE IT PATENTLY ILLEGAL WITH NO EXCEPTIONS TO DO TAGGING,
24 RIGHT? OTHERWISE, YOU WOULD GET THE PROBLEM THAT YOU'RE
25 HIGHLIGHTING, WHICH IS NON-ACCOUNT USERS GETTING CAUGHT UP IN

1 IT .

2 **MR. MILLIAN:** DAVID MILLIAN. SINCE WE'RE TALKING
3 ABOUT HYPOTHETICALS, OBVIOUSLY, IF THERE'S A PICTURE AND
4 THERE'S A SCAN FROM AN ILLINOIS IP ADDRESS THAT IMMEDIATELY
5 MATCHES A USER, THEN, CLEARLY, FACEBOOK KNOWS THIS IS A USER.
6 THEY'VE BEEN BEFORE UPLOADING IT OR STORING IT, PROVIDE A
7 CONSENT OR REQUIRED CONSENT --

8 **THE COURT:** WELL, THAT'S YOUR COLLEAGUES. THAT'S THE
9 OTHER CASE. THAT'S THE USERS' CASE.

10 **MR. MILLIAN:** RIGHT. AND IF THERE WERE PICTURES FULL
11 OF USERS, THEN THEY'RE FINE. BUT IF THEY DO THE SCAN AND ONE
12 OF THE PICTURES DOESN'T MATCH, THEY KNOW THERE IS A NON-USER
13 THERE. AND IN THOSE INSTANCES -- WE'RE TALKING HYPOTHETICAL --

14 **THE COURT:** I SEE.

15 **MR. MILLIAN:** -- THAT MIGHT BE AN INSTANCE WHERE THEY
16 WOULDN'T BE ABLE TO --

17 **THE COURT:** YOU'RE SAYING THEY SHOULD HAVE AN
18 ALGORITHM THAT IMMEDIATELY DROPS THE NON-USER BECAUSE THEY
19 COULD NOT AS A PRACTICAL MATTER GET CONSENT. SO IF THEY CAN'T
20 GET CONSENT, THEY SHOULD NOT EVEN HAVE THOSE PEOPLE IN TAGGING.

21 **UNIDENTIFIED SPEAKER:** (UNDISCERNIBLE.)

22 **THE COURT:** OKAY. ALL RIGHT. IT JUST -- IT
23 INTERESTED ME FOR A MOMENT.

24 OKAY. ANYTHING ELSE I CAN HELP YOU WITH?

25 **MR. MILLIAN:** JUDGE, DAVID MILLIAN AGAIN. WE HAD

1 ORIGINALLY FILED THE CASE IN STATE COURT AND SO --

2 **THE COURT:** YES.

3 **MR. MILLIAN:** -- WE WERE RECENTLY ADVISED THAT
4 FACEBOOK INTENDS TO FILE A MOTION TO DISMISS FOR LACK OF
5 SUBJECT MATTER JURISDICTION.

6 **THE COURT:** AH. SO YOU WANT TO STIPULATE TO A
7 REMAND?

8 **MR. MILLIAN:** WE'RE PREPARED TO DO THAT.

9 **THE COURT:** WHAT DO YOU THINK?

10 **MR. NADOLENCO:** SO, YOUR HONOR, FACEBOOK'S NOT
11 PREPARED TO WAIVE ITS RIGHTS UNDER CAFA TO HAVE THE FEDERAL
12 COURT DECIDE SUBJECT MATTER JURISDICTION, AND WE THINK A REMAND
13 WOULD BE APPROPRIATE IF, AND ONLY IF, THE COURT DETERMINES IT
14 DOES NOT HAVE SUBJECT MATTER JURISDICTION. AND, OF COURSE, WE
15 WOULDN'T TO BE LITIGATING THE SAME CASE IN BOTH FEDERAL COURT
16 AND IN STATE COURT, SO --

17 **THE COURT:** HE JUST BROUGHT A SPOKEO MOTION, SO YOUR
18 DREAM MAY COME TRUE.

19 I MEAN, WHAT DO YOU WANT ME TO DO? HE JUST FILED A
20 MOTION SAYING I CAN'T HEAR IT UNDER ARTICLE III. NOW YOU'RE
21 TELLING ME, WELL, MAYBE YOU CAN? I MEAN --

22 **MR. NADOLENCO:** OBVIOUSLY, WE DON'T BELIEVE THE COURT
23 HAS SUBJECT MATTER JURISDICTION UNDER SPOKEO. BUT IF THE COURT
24 WERE TO CONCLUDE OTHERWISE, THEN BOTH CASES WOULD REMAIN BEFORE
25 YOUR HONOR, AND WE WOULD LITIGATE THEM BOTH HERE; OTHERWISE,

1 PRESUMABLY, WE'D CONSIDER THE OPTIONS UPON THE RULING ON THE
2 MOTION TO DISMISS.

3 **THE COURT:** WHERE DID YOU FILE IT? IN CALIFORNIA?

4 **UNIDENTIFIED SPEAKER:** CALIFORNIA, JUDGE. IT WAS
5 REMOVED 30 DAYS AFTER FILING IN 2015.

6 **THE COURT:** HOW DO YOU CROSS THE \$5 MILLION CAFA
7 THRESHOLD?

8 **MR. NADOLENCO:** PARDON ME?

9 **THE COURT:** DID YOU REMOVE IT ON CAFA GROUNDS?

10 **MR. NADOLENCO:** YES, YOUR HONOR.

11 **THE COURT:** HOW DO THEY GET ACROSS \$5 MILLION?

12 **MR. NADOLENCO:** STATUTORY --

13 **THE COURT:** HOW DO THEY GET ACROSS \$5 MILLION?

14 **MR. NADOLENCO:** THE AGGREGATION OF THE STATUTORY
15 DAMAGES UNDER BIPA.

16 **THE COURT:** YOU DON'T KNOW HOW MANY PEOPLE ARE IN THE
17 CLASS, THOUGH, RIGHT?

18 **MR. NADOLENCO:** THEY'VE ALLEGED IT'S THE --

19 **THE COURT:** THE ENTIRE STATE OF ILLINOIS WHO'S NOT ON
20 FACEBOOK?

21 **MR. NADOLENCO:** RIGHT, I MEAN --

22 **THE COURT:** HOW MANY PEOPLE IS THAT? 20, 30?

23 **MR. NADOLENCO:** IT'S A LOT. IT'S A LOT.

24 **THE COURT:** REALLY? FACEBOOK'S LOSING SHARE IN
25 ILLINOIS? HOW MANY PEOPLE IN ILLINOIS ARE NOT ON FACEBOOK? I

1 MEAN, HOW DO YOU KNOW IT?

2 **MR. NADOLENCO:** IT DOESN'T TAKE THAT MANY UNDER
3 THE --

4 **THE COURT:** NO, BUT UNDER DARK CHEROKEE -- I GUESS
5 YOU GUYS DIDN'T CONTEST REMOVAL, DID YOU?

6 **MR. HEDIN:** WE DID NOT, JUDGE.

7 **THE COURT:** ALL RIGHT. HAD YOU CONTESTED IT UNDER
8 DARK CHEROKEE, YOU WOULD HAVE PUT A PREPONDERANCE BURDEN OF
9 PROOF ON YOUR OPPONENTS TO COME UP WITH THE 5 MILLION, A BATTLE
10 YOU MAY HAVE WON, BECAUSE IT SOUNDS TO ME LIKE IT WOULD BE HARD
11 TO QUANTIFY THAT. BUT, IN ANY EVENT, YOU'VE LOST THAT.

12 **MR. MILLIAN:** JUDGE, DAVID MILLIAN AGAIN.

13 APPARENTLY, THE CIRCUMSTANCES HAVEN'T CHANGED. WHEN
14 THEY FILED A NOTICE FOR REMOVAL, PRESUMABLY FACEBOOK BELIEVED
15 THIS COURT HAD SUBJECT MATTER JURISDICTION, BOTH CAFA AND
16 ARTICLE III. OTHERWISE, THEY WOULD NOT HAVE BEEN IN A POSITION
17 TO REMOVE THE CASE AT THAT TIME. NOTHING'S CHANGED OTHER THAN
18 AN OPINION HAS COME DOWN. BUT THE FACTS ARE THE SAME.

19 IF THEY NOW BELIEVE THERE IS NO ARTICLE III
20 JURISDICTION, WE THINK REMAND IS APPROPRIATE.

21 **MR. NADOLENCO:** THAT WAS A PRETTY BIG CHANGE, THOUGH,
22 YOUR HONOR, THE SUPREME COURT RULING IN *SPOKEO* WHEN WE REMOVED.
23 OBVIOUSLY, THAT WAS NOT THE LAW. *EDWARDS* WAS THE LAW. NOW
24 *SPOKEO* IS THE LAW.

25 **THE COURT:** OKAY. ANYTHING ELSE? ALL RIGHT. THANK

1 YOU.

2 **MR. WILLIAMS:** MAY I BE HEARD?

3 **THE COURT:** YES. GO AHEAD, MR. WILLIAMS.

4 **MR. WILLIAMS:** WE ARE OBVIOUSLY HERE ON THE --

5 **THE CLERK:** STATE YOUR NAME.

6 **MR. WILLIAMS:** I'M SORRY. SHAWN WILLIAMS IN THE
7 CONSOLIDATED ACTION. WE ARE HERE ON THAT CASE, YOUR HONOR.
8 DEFENDANTS HAVE FILED A SPOKEO MOTION IN THIS CASE THAT'S
9 BEFORE YOU.

10 **THE COURT:** RIGHT.

11 **MR. WILLIAMS:** NOT THE GULLEN CASE. SO THAT ISSUE IS
12 GOING TO BE BEFORE YOU IN THAT ONE BEFORE THE STATE COURT
13 ACTION IS HEARD.

14 A COUPLE OF THINGS ABOUT OUR CASE MANAGEMENT.

15 **THE COURT:** YOU FILED ORIGINALLY IN ILLINOIS FEDERAL
16 COURT?

17 **MR. WILLIAMS:** ACTUALLY, THE CASE WAS INITIALLY FILED
18 IN ILLINOIS STATE COURT. THAT'S THE LICATA ACTION. THERE WERE
19 TWO ACTIONS THAT WERE FILED AFTERWARD, BUT THEY REMOVED THE
20 LICATA ACTION TO FEDERAL COURT, AND THEN THE CASE WAS
21 TRANSFERRED TO THIS COURT FROM THE --

22 **THE COURT:** YOU WANT TO BE BACK IN ILLINOIS STATE
23 COURT?

24 **MR. WILLIAMS:** I'M SORRY?

25 **THE COURT:** WOULD YOU LIKE TO BE BACK IN ILLINOIS

1 STATE COURT?

2 **MR. WILLIAMS:** WELL, YOUR HONOR, WE STIPULATED TO BE
3 HERE IN FRONT OF YOUR HONOR AND THE -- WE BELIEVE THAT THE CASE
4 IS APPROPRIATELY BEFORE YOU.

5 I READ THEIR BRIEF THIS MORNING BRIEFLY. I DON'T
6 BELIEVE THAT IT IS PERSUASIVE, BUT THAT'S ME.

7 **THE COURT:** GIVE ME -- JUST GIVE ME A SOUND BITE
8 ABOUT WHY.

9 **MR. WILLIAMS:** WELL, BECAUSE I THINK THAT WE'VE
10 ADEQUATELY ALLEGED THE CONCRETENESS OF OUR PLAINTIFF'S INJURY.

11 SPOKEO HAS GONE BACK TO THE NINTH CIRCUIT. I THINK
12 THESE LAWYERS ARE ACTUALLY LITIGATING THAT CASE IN FRONT OF THE
13 NINTH CIRCUIT. THE NINTH CIRCUIT WILL EXPLAIN WHAT THE -- WHAT
14 HAS TO BE ALLEGED IN ORDER TO ADEQUATELY ALLEGE CONCRETENESS
15 CONSISTENT WITH THE SUPREME COURT OPINION IN SPOKEO.

16 WE DON'T KNOW WHAT THAT'S GOING TO BE, BUT IN OUR
17 CASE WE DON'T THINK THAT IT MATTERS. WE THINK THAT WE'VE
18 ADEQUATELY ALLEGED CONCRETENESS, THAT THE -- THAT FACEBOOK
19 IMPROPERLY, WITHOUT CONSENT, TOOK THE BIOMETRIC IDENTIFIERS AND
20 DATA FROM OUR PLAINTIFFS AND MISAPPROPRIATED THEM --
21 MISAPPROPRIATED THEM, THEN USED THEM TO PROFIT OR TO EXPAND
22 FACEBOOK'S USER BASE BY OFFERING THIS TAGGING PROCESS.

23 **THE COURT:** FACEBOOK IS A FREE -- YOU DON'T PAY
24 ANYTHING FOR THE SERVICE.

25 **MR. WILLIAMS:** THAT'S RIGHT, YOU DON'T.

1 **THE COURT:** SO HOW ARE THEY -- HOW IS FACEBOOK
2 PROFITING FROM EXPANDING ITS USER BASE?

3 **MR. WILLIAMS:** BECAUSE THAT -- EXPANDING ITS USER
4 BASE ALLOWS THEM TO ADVERTISE TO MORE PEOPLE. IT'S EXACTLY HOW
5 THEY EARN REVENUE.

6 SO -- AND I DON'T WANT TO OPINE ON -- I'LL GIVE YOU
7 MY OPINION ON HOW THEY MAKE MONEY. BUT ONE OF THE WAYS IN
8 WHICH THEY MAKE MONEY IS OFFERING SERVICES THAT ARE ATTRACTIVE
9 TO PEOPLE, NOT JUST IN ILLINOIS, BUT ALL OVER.

10 ONE OF THE BIGGEST ATTRACTIONS BEING ABLE TO TAG YOUR
11 FRIENDS ON FACEBOOK. THAT EXPANDS THEIR USER BASE, WHICH
12 EXPANDS THE NUMBER OF PEOPLE THAT THEY CAN ACTUALLY ADVERTISE
13 TO.

14 SO THEY MAY NOT -- YOU KNOW, PEOPLE MAY NOT BE PAYING
15 TO BE A MEMBER OF FACEBOOK, BUT THEY CERTAINLY ARE PROFITING
16 FROM THAT USER BASE BY OFFERING THIS PROCESS WHICH ALLOWS THEM
17 TO EXPAND THEIR USER BASE.

18 I'LL TELL YOU THAT ONE OF THE THINGS THAT WE'VE ASKED
19 FOR IN DISCOVERY IS EXACTLY HOW FACEBOOK IS PROFITING OR USING
20 TAGGING AND THE EXTRACTION OF BIOMETRIC INFORMATION AND
21 MONETIZING THAT ON ITS PLATFORM.

22 THE STATUTE DOES PROHIBIT, IN ADDITION TO EXTRACTING
23 BIOMETRIC INFORMATION, PROFITING FROM THE EXTRACTION OF THAT
24 INFORMATION.

25 SO I'M GIVING YOU MY OPINION. WE'VE DEMANDED

1 INFORMATION FROM FACEBOOK IN THE PROCESS OF NORMAL DISCOVERY.
2 THEY HAVEN'T PRODUCED ANYTHING YET.

3 **THE COURT:** BUT THE HARM TO YOUR PLAINTIFFS IS THE
4 STATUTORY VIOLATION, RIGHT? THERE'S NO OTHER HARM?

5 **MR. WILLIAMS:** STATUTORY --

6 **THE COURT:** IT HASN'T COST THEM ANY MONEY. IT HASN'T
7 DISRUPTED THEIR LIVES IN ANY WAY. I MEAN, THE HARM IS
8 STRICTLY -- WHAT IS IT? 1500? WHATEVER THE DOLLAR AMOUNT IS
9 IN BIPA.

10 **MR. WILLIAMS:** IT'S A THOUSAND --

11 **THE COURT:** THOUSAND.

12 **MR. WILLIAMS:** -- DOLLARS PER NEGLIGENT VIOLATION.

13 **THE COURT:** AND THE HARM?

14 **MR. WILLIAMS:** THE STATUTE IDENTIFIES THE VIOLATION.
15 THE ALLEGATION OF THE CONCRETENESS OF THE HARM, WE BELIEVE, IS
16 THE TAKING OF THIS VERY UNIQUE INFORMATION WITHOUT --

17 **THE COURT:** I UNDERSTAND THAT. BUT THE DOLLAR HARM,
18 THE FINANCIAL HARM IS PURELY THE STATUTORY -- THE PENALTY UNDER
19 THE STATUTE.

20 **MR. WILLIAMS:** YOU KNOW, IT'S HARD -- I WANT TO BE
21 CAREFUL HERE, YOUR HONOR, BECAUSE IT'S HARD TO SAY THAT'S THE
22 HARM BECAUSE THE STATUTE ACTUALLY IDENTIFIES WHAT THE PENALTY
23 IS FOR THIS VIOLATION.

24 SO IT'S HARD TO SAY THAT THE HARM IS THE MONEY. I
25 THINK THAT THE HARM IS THE EXTRACTION OF THAT UNIQUE

1 INFORMATION AND USING IT FOR PROFIT.

2 **THE COURT:** THE WORST THING THAT HAPPENS TO BOTH
3 SIDES IS YOU GET BACK TO THE COURT YOU ORIGINALLY FILED IN.
4 HARDLY A HEARTBREAK. I DON'T KNOW WHY IT'S --

5 **MR. WILLIAMS:** IT'S AN IRONIC --

6 **THE COURT:** -- I MEAN, WHY FACEBOOK WANTS THAT.

7 **MR. WILLIAMS:** IT IS IRONIC WHEN THEY ASKED TO BE
8 HERE.

9 **THE COURT:** YEAH, BUT IF THEY WANT TO FIGHT MULTIPLE
10 WARS IN STATE COURT, THAT'S FINE. EITHER WAY YOU'RE GOING TO
11 HAVE YOUR DAY IN COURT.

12 **MR. WILLIAMS:** ONE WAY OR ANOTHER, I THINK SO, YOUR
13 HONOR.

14 **THE COURT:** OKAY. ALL RIGHT. ANYTHING ELSE I CAN
15 HELP YOU WITH?

16 **MR. WILLIAMS:** ONLY JUST SORT OF OUTLINING QUICKLY
17 YOUR HONOR'S EXPECTATIONS FOR THE -- YOU KNOW, THE SCHEDULE
18 GOING FORWARD. WE TRIED --

19 **THE COURT:** I'M PROBABLY GOING TO DO -- YOURS WAS --
20 THE PLAINTIFFS' SIDE WAS A LITTLE TOO BRISK, AND THE
21 DEFENDANT'S WAS TOO DRAWN OUT. NOT AN UNCOMMON PROBLEM, SO I'M
22 GOING TO PICK SOMETHING THAT'S GOING TO BE KIND OF IN THE
23 MIDDLE. OKAY. ALL RIGHT?

24 GET TOGETHER SOON ON COORDINATING DISCOVERY. AND WHY
25 DON'T YOU -- WHY DON'T WE DO THIS: WHY DON'T -- WHEN YOU DO

1 THAT, WHY DON'T YOU ALSO DO A JOINT -- BOTH CASES AND
2 DEFENDANTS PROPOSE A NEW PROPOSED SCHEDULE. OKAY? YOU CAN ALL
3 SIT DOWN, TALK ABOUT WHAT YOUR NEEDS ARE GOING TO BE. SEND ME
4 THAT AND ANY NEEDS YOU HAVE ON DISCOVERY, AND I'LL ISSUE A CASE
5 MANAGEMENT ORDER. OKAY? CAN YOU DO IT IN THE NEXT COUPLE OF
6 WEEKS?

7 **MR. WILLIAMS:** YES, YOUR HONOR.

8 (SIMULTANEOUS SPEAKING.)

9 **MR. WILLIAMS:** LAST POINT IS --

10 **THE COURT:** PERHAPS EVEN IN THE HALLWAY ON THE WAY
11 OUT.

12 **MR. WILLIAMS:** LAST POINT IS ASSUMING THE -- YOU
13 KNOW, THE COURT IS NOT STAYING DISCOVERY AS THEY SUGGESTED IN
14 THEIR --

15 **THE COURT:** THE COURT DOES NOT ACT ON SUGGESTIONS.
16 IF YOU WANT TO BRING A MOTION, YOU CAN DO THAT.

17 **MR. WILLIAMS:** THANK YOU, YOUR HONOR.

18 **THE COURT:** WE DON'T DO THINGS OFF THE CUFF.

19 OKAY. YES?

20 **MR. BALABANIAN:** MAY I MAKE ONE POINT, YOUR HONOR?

21 **THE COURT:** OF COURSE. YEAH.

22 **MR. BALABANIAN:** (UNDISCERNIBLE) I APPRECIATE IT.

23 **THE CLERK:** AND YOU ARE?

24 **MR. BALABANIAN:** RAFEY BALABANIAN -- EXCUSE ME -- FOR
25 PLAINTIFFS.

1 I WOULD JUST ADD TO WHAT MR. WILLIAMS WAS SAYING IN
2 TERMS OF THE HARM, WE ALSO ALLEGE AN INVASION OF PRIVACY. AND
3 TO THE EXTENT THAT'S QUANTIFIABLE, THAT ISSUE IS OUT THERE, BUT
4 THE ACT OF TAKING PEOPLE'S BIOMETRIC INFORMATION IF YOU WANT TO
5 REDUCE IT TO KIND OF --

6 **THE COURT:** OH WAIT. YOU HAVE STATE LAW ILLINOIS
7 SEPARATE INVASION OF PRIVACY CLAIM?

8 **MR. BALABANIAN:** NO, BUT THERE IS AN INVASION OF
9 PRIVACY THAT IS INHERENT IN THE CONDUCT ITSELF, AND THAT
10 INVASION OF PRIVACY WE BELIEVE IS QUANTIFIABLE.

11 WE BELIEVE THERE IS DAMAGE WHEN IT COMES TO THAT,
12 BECAUSE IF YOU MISAPPROPRIATE SOMEONE'S LIKENESS, THERE COULD
13 BE HARM THERE. SO JUST TO LIMIT IT TO THE STATUTORY VIOLATION,
14 I THINK --

15 **THE COURT:** WELL, THEY'RE NOT MISAPPROPRIATING IT --
16 I MEAN -- ALL RIGHT. THIS GOES BACK TO THE IDEA THAT ANY
17 MISAPPROPRIATION IS SOMEHOW GOING TO INCREASE FACEBOOK'S BOTTOM
18 LINE?

19 I MEAN, THIS IS NOT CLASSIC MISAPPROPRIATION OF A
20 LIKENESS. THEY'RE NOT PUTTING IT ON A COKE BOTTLE.

21 **MR. BALABANIAN:** NO. THAT IS EXACTLY RIGHT. THE
22 COURT FOLLOWS IT EXACTLY.

23 BUT, YES, IT WOULD GO TO THEIR BOTTOM LINE, AND
24 THAT'S HOW WE UNDERSTAND THEY MAKE BUSINESS IN OUR NAIVE VIEW.

25 I WILL MAKE ONE POINT ABOUT THE *SPOKEO* ISSUE, AND THE

1 COURT'S HEARD PLENTY ABOUT IT, AND MY FIRM WAS THE OTHER SIDE
2 OF THE SUPREME COURT.

3 **THE COURT:** THIS IS JUST A TEASER. OKAY. WE'RE
4 NOT -- NO DECISIONS ARE BEING MADE.

5 (SIMULTANEOUS SPEAKING)

6 **THE COURT:** IT'S AN INTERESTING ISSUE. GO AHEAD.
7 YEAH.

8 **MR. BALABANIAN:** I'M NOT ARGUING, BECAUSE I WAS
9 NOT -- I'M CERTAINLY NOT SOPHISTICATED ENOUGH TO ACTUALLY ARGUE
10 THOSE ISSUES.

11 **THE COURT:** YEAH.

12 **MR. BALABANIAN:** I WILL SAY THAT IT SEEMS, THOUGH,
13 WHAT THEY'RE REALLY GETTING AT IS THEY WANT A RULING FROM THIS
14 COURT ABOUT SUBJECT MATTER JURISDICTION IN LIGHT OF A PRIVACY
15 STATUTE, BECAUSE IF WE'RE HERE SAYING, WE'LL STIPULATE TO
16 REMAND IT, WE'LL GO BACK TO WHEREVER, IT SEEMS LIKE IT WOULD BE
17 SOMEWHAT OF A WASTE OF TIME FOR THE COURT TO HAVE TO WEIGH IN
18 ON THAT. I'M NOT SAYING THAT --

19 **THE COURT:** WELL, I ASKED THEM THAT, AND THEY SAID,
20 NO, THEY'RE NOT GOING TO DO THAT. SO THAT'S WHERE YOU ARE.

21 **MR. BALABANIAN:** THANK YOU FOR YOUR TIME.

22 **THE COURT:** ANYTHING ELSE? OKAY. GOOD. THANK YOU.

23 (PROCEEDINGS ADJOURNED AT 1:56 P.M.)

24

25

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I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
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ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
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mcolumbini
JOAN MARIE COLUMBINI

JOAN MARIE COLUMBIN II

JULY 13, 2016